BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHEILA VANORMAN	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,047,667
	)	
U.S.D. 259	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

All parties requested review of the June 12, 2014, Award entered by Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on October 14, 2014. John L. Carmichael of Wichita, Kansas, appeared for claimant. Dallas Rakestraw of Wichita, Kansas, appeared for self-insured respondent.

The SALJ found claimant permanently and totally disabled. Moreover, the SALJ determined respondent is entitled to an offset of claimant's Social Security and KPERS retirement benefits pursuant to K.S.A. 2008 Supp. 44-501(h). The SALJ found claimant's weekly benefit rate under KPERS should be reduced by $15.40 on a weekly basis and reduced for Social Security benefits until May 23, 2010, the date claimant turned 65 years of age.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues claimant sustained two scheduled injuries on May 26, 2009, with an 8 percent functional impairment to the right upper extremity and a 1 percent functional impairment to the left upper extremity. Should the Board determine claimant sustained a back injury, respondent contends claimant has a 50 percent work disability and is not permanently and totally disabled. Further, respondent argues it is entitled to a credit equal to the weekly value of claimant's Social Security and KPERS retirement benefits as follows: $214.62 for the period of January 2010 through March 2011, $350.67 for the period of April 2011 through December 2011, and $352.86 for the period of January 2011 through the present.

Claimant argues respondent failed to rebut the presumption of permanent total disability. Claimant maintains respondent is not entitled to an offset for claimant's Social Security benefits, nor is respondent entitled to a Social Security offset following the date of her 65th birthday. Claimant also argues respondent failed to sustain the burden of proving the amount of claimant's KPERS benefits attributable to her contributions versus respondent's contributions. As such, claimant contends respondent is not entitled to a credit for KPERS benefits received.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?

    a. What is claimant's functional impairment?

    b. Is claimant permanently and totally disabled?

2. Is respondent entitled to an offset based on claimant's Social Security retirement benefits, and if so, are the disability benefits for functional impairment and temporary total disability benefits subject to the Social Security offset?

3. Is respondent entitled to an offset based on claimant's KPERS benefits, and if so, what is the amount?

FINDINGS OF FACT

Claimant was employed by respondent in 1993 to load cold cabinets and hot carriers with food for delivery to local schools for lunch. During the last two years of her employment, claimant also loaded frozen food from pallets into cold cabinets for an hour each day. After the food was loaded, claimant went to a school and served lunch to the students. Claimant testified she prepared the food line, served the students and cleaned up the food line, all in the span of approximately two hours. Claimant stated her regular working hours were 4:00 a.m. to 12:30 p.m.

During the summer months, claimant worked for Bell Properties cleaning and painting apartments. Claimant explained she thoroughly cleaned the apartments, using her hands and arms and climbing ladders. She paced herself while doing this job. While painting, claimant stated she used a roller and did not paint overhead or use a ladder.

In 1997, while working for respondent, claimant began treating with Dr. Kneidel for a right shoulder condition. Dr. Kneidel eventually performed an arthroscopy of the right shoulder and a ganglion excision of the right wrist. Dr. Kneidel released claimant with no restrictions. Claimant returned to her regular duties with respondent.

Dr. Mark Melhorn, a medical doctor specializing in orthopedics, treated claimant in 2000 for complaints in her hands, wrists, and elbows. He performed right carpal tunnel syndrome surgery, a right ulnar nerve decompression at the elbow, and right lateral epicondylectomy in 2001. Shortly thereafter, Dr. Melhorn performed left carpal tunnel syndrome surgery and a left ulnar nerve decompression at the elbow. He provided post surgical care and released claimant to her regular duties. Claimant testified she received workers compensation benefits from respondent for her elbows and wrists.

Claimant returned to Dr. Melhorn in 2002 after she "messed up the shoulder again."[1] Dr. Melhorn performed a right shoulder acromioplasty with rotator cuff repair in November 2002. He provided post surgical care and released claimant to her regular duties at respondent without permanent restrictions.

Claimant was treated by Dr. Dobyns in 2003 for thoracic spine pain. Records indicate claimant sustained trauma to the thoracic spine after being struck by a food cart. Dr. Dobyns referred claimant to physical therapy for her back and to Dr. Kneidel for further treatment. Claimant received treatment for her back until early 2004, when she was released with full range of motion to the cervical and thoracic spine. Claimant noted some occasional discomfort, but returned to her full duties at respondent following her release.

Claimant continued to work for respondent. In May 2009, claimant reported bilateral shoulder pain as the result of unloading frozen food. The parties stipulated to an accident date of May 26, 2009.

Dr. Melhorn was authorized to treat claimant's shoulders and examined claimant's shoulders and neck on May 19, 2009. Dr. Melhorn testified he also x-rayed claimant's neck, because the neck could generate her shoulder pain, but he did not provide any specific treatment for claimant's neck. Claimant's neck x-rays were normal. Dr. Melhorn did not feel claimant required additional surgery for her bilateral shoulder condition, and he instead treated her condition non-surgically.

Claimant worked for Bell Properties during the summer of 2009. This was the last summer claimant worked for Bell Properties. In August 2009, Dr. Melhorn imposed temporary work restrictions which respondent was unable to accommodate. Claimant's last day worked at respondent was August 12, 2009.

Claimant continued to follow up with Dr. Melhorn. Dr. Melhorn ordered an MRI of claimant's right shoulder in August 2009. The MRI was normal except for some age-related osteoarthritis involving the AC joint. Dr. Melhorn indicated claimant would continue to have chronic symptoms regarding her bilateral shoulders. On October 29, 2009, Dr.

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[1] R.H. Trans. at 37.

Melhorn noted claimant's symptoms remained unchanged after two months of not working. He wrote:

> . . . I think that regular work limit hand over shoulder right and left is a reasonable long term guide. . . . She does not require any additional specific medical intervention at this point so we will go ahead and release and follow up as needed.[2]

In January 2010, claimant applied for and received Social Security benefits in the amount of $930.00 per month. The amount increased in January 2011 to $939.50 per month. Claimant began receiving $972.90 per month in 2012.

Dr. Pat Do, a board certified orthopedic surgeon, performed an independent medical evaluation (IME) of claimant at the court's request on March 25, 2010. He described claimant's condition on that date:

> Number one, left shoulder pain, possibly some impingement, maybe a rotator cuff issue; right shoulder pain, maybe some residual impingement, maybe a rotator cuff issue; lower back pain with some numbness and tingling down her left leg; bilateral SI type pain; status post bilateral elbow surgery for which she's at maximum medical improvement; status post bilateral wrist surgery for which she's at maximum medical improvement.[3]

Dr. Do opined claimant's bilateral shoulder and back conditions were related to her work activities after reviewing claimant's history, medical records, and performing a physical examination. He recommended MRI scans of her shoulders and x-rays and an MRI of claimant's lumbar spine.

Claimant began receiving retirement benefits through the Kansas Public Employees Retirement System (KPERS) in the amount of $638.47 per month effective April 1, 2010, claimant's official retirement date. Claimant contributed $15,228.09 to KPERS, including a $11,710.76 member contribution and $3,517.33 in interest. Respondent contributed $14,292.34.[4] Mary Beth Green, member services officer for KPERS, testified regarding claimant's contributions to KPERS. She testified contributions by claimant and respondent are commingled into a KPERS fund with contributions made by other employers and employees. Ms. Green did not know if it was possible to determine which percentage of claimant's pension benefits are attributable to her contributions without utilizing the services of an actuary.

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[2] Melhorn Depo., Ex. 2 at 1.

[3] Do Depo. at 8.

[4] Green Depo., Ex. 3.

Claimant continued to treat with Dr. Do, who initially provided conservative care for her shoulders and physical therapy for her back. He eventually performed a left shoulder arthroscopy with extensive debridement of the glenohumeral joint including the labrum, synovium and the undersurface of the rotator cuff, a left subacromial decompression and a left rotator cuff repair on August 23, 2010. He then performed a right shoulder arthroscopy subacromial decompression with extensive debridement of the glenohumeral joint and rotator cuff repair on January 17, 2011. Claimant followed up with Dr. Do before he released her at maximum medical improvement (MMI) on June 7, 2011, with no permanent work restrictions. Dr. Do testified he did not feel formal restrictions were necessary at the time of claimant's release because she could self-limit. Dr. Do stated:

> As a general statement, if a patient tells me that she can self-limit anything that hurts too much and there is no real biomechanical reason that would cause harm and she chooses no restrictions, then typically we respect that and would do no restrictions.[5]

In a letter dated November 17, 2011, Dr. Do provided a permanent impairment rating for claimant. Using the AMA *Guides*,[6] Dr. Do opined claimant sustained a 7 percent impairment to the right upper extremity at the shoulder level, a 2 percent impairment to the left upper extremity at the shoulder level, and a 5 percent impairment to the whole person related to the low back. Dr. Do explained the impairment rating for claimant's right upper extremity does not include claimant's previous surgeries or preexisting impairment. He further stated claimant's work activity, if not having caused her bilateral shoulder and low back conditions, at least aggravated and/or contributed to the development of her symptoms.

Dr. Pedro Murati, a physician specializing in chronic pain management, IMEs, electrodiagnosis and physical medicine, examined claimant on July 11, 2011, at claimant's counsel's request. Claimant complained of occasional bilateral shoulder pain, bilateral hip pain, low back pain, and numbness in the left leg to the knee. Dr. Murati reviewed claimant's medical records, history, and performed a physical examination. Dr. Murati opined claimant injured her shoulders, back and thoracic regions simultaneously as she performed her work each and every day. He wrote, "This claimant's current diagnoses are within all reasonable medical probability a direct result from her work-related injuries which were sustained each working day through 08/12/09 while working for [respondent]."[7] Dr. Murati opined that due to claimant's age, restrictions and combined injuries, she is essentially and realistically unemployable.

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[5] *Id*. at 21.

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[7] Murati Depo., Ex. 2 at 7.

Using the AMA *Guides*, Dr. Murati assigned a 5 percent impairment to the right shoulder for the 2011 subacromial decompression and a 7 percent impairment for loss of range of motion to the right shoulder. This combines to a 12 percent impairment to the right upper extremity, or 7 percent impairment to the whole person. He determined claimant sustained a 10 percent impairment to the left shoulder for the 2010 subacromial decompression and a 5 percent impairment for loss of range of motion to the left shoulder. This combines to a 15 percent impairment to the left upper extremity, or 9 percent impairment to the whole person. Dr. Murati placed claimant in Cervicothoracic DRE Category II for myofascial pain syndrome affecting the cervical paraspinals for an impairment of 5 percent to the whole person. For myofascial pain affecting the thoracic paraspinals, Dr. Murati placed claimant in Thoracolumbar DRE Category II for an impairment of 5 percent to the whole person. Finally, Dr. Murati placed claimant in Lumbosacral DRE Category III for her low back pain with radiculopathy, for a 10 percent whole person impairment. The combined whole person impairment is 32 percent.

Dr. Stein, a neurological surgeon, examined claimant on January 5, 2012, at respondent's request. Claimant only complained about her shoulders and had no low back or neck complaints at the time of the examination. Claimant discussed her prior low back and left lower extremity symptoms with Dr. Stein, but said they were not altered by the 2009 activity. Dr. Stein reviewed claimant's medical records, history, and performed a physical examination, finding claimant had a full range of cervical movement, no cervical muscular spasm, no tenderness, and no guarding. He wrote:

> In my opinion, there is no documentation or evidence of injury to any other body part on or about 4/1/09 except the shoulders. Additionally, regardless of causation, today's examination does not reflect evidence of permanent impairment of function to the neck or lower back.[8]

Dr. Stein determined, using the AMA *Guides*, claimant sustained an 8 percent impairment to the right upper extremity at the level of the shoulder and a 1 percent impairment to the left upper extremity at the level of the shoulder. Dr. Stein testified he could not determine what preexisting impairment claimant had to the right upper extremity. He stated there is no actual impairment for subacromial decompression surgeries. Dr. Stein indicated whether claimant has an impairment is associated with loss of range of motion as a result of the injury and resulting surgery.

Dr. Stein imposed permanent restrictions for claimant and opined she was employable within his restrictions, which included no activity with the right hand above shoulder level or fully outstretched, minimal activity with the left hand above shoulder level or fully outstretched, and avoid intensively repetitive activity with either upper extremity involving the shoulder.

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[8] Stein Depo., Ex. 2 at 7.

Jerry Hardin, a vocational expert, first interviewed claimant on August 10, 2011, at claimant's counsel's request. Mr. Hardin prepared a task list containing 19 unduplicated tasks. He opined claimant was permanently and totally disabled based upon the permanent restrictions imposed by Dr. Murati. Dr. Murati reviewed the task list generated by Mr. Hardin. Dr. Murati opined claimant could perform 2 of the 19 unduplicated tasks on the list, for an 89.4 percent task loss.

Steve Benjamin, a vocational rehabilitation consultant, interviewed claimant at respondent's request on December 27, 2011. Mr. Benjamin reviewed the lack of restrictions from Dr. Do and concluded claimant could return to her position at respondent. Mr. Benjamin later reviewed restrictions imposed by Dr. Stein, and based upon Dr. Stein's restrictions, Mr. Benjamin opined claimant could reenter the open labor market in an entry-level position. Dr. Stein reviewed the task list prepared by Mr. Benjamin and opined claimant could no longer perform 8 of the 20 unduplicated tasks on the list, for a 40 percent task loss.

The SALJ requested an IME of claimant from Dr. Peter Bieri, a physician. Dr. Bieri performed this IME on February 3, 2014, at which time he reviewed claimant's medical records, history, and performed a physical examination. Claimant continued to have pain in her shoulders, which at times radiated into the neck. Claimant also complained of low back pain, worsened with activity, with occasional pain radiating into the hips and proximal left lower extremity. Dr. Bieri determined claimant sustained an injury during the course of employment, primarily involving the shoulders and low back. He concluded claimant had achieved MMI and imposed permanent restrictions of light-medium duty, which includes only occasional lifting up to 35 pounds, no frequent lifting over 20 pounds, no constant lifting over 10 pounds, and no more than occasional shoulder-level and overhead use of the upper extremities.

Using the AMA *Guides*, Dr. Bieri opined claimant sustained a 5 percent impairment of the left upper extremity for range of motion deficits and a 4 percent impairment of the left upper extremity for rotator cuff weakness. These combine for a total 9 percent impairment to the left upper extremity, or 5 percent impairment to the whole person. Dr. Bieri determined claimant sustained a 10 percent impairment to the right upper extremity for range of motion deficits and a 4 percent impairment to the right upper extremity for rotator cuff weakness. These combine for a total 14 percent impairment to the right upper extremity, or 8 percent impairment to the whole person. Dr. Bieri noted that absent any information regarding claimant's preexisting right upper extremity impairment value, he is "forced to attribute the current right shoulder impairment to the injury in question."[9]

Dr. Bieri further agreed with Dr. Do's assessment of 5 percent impairment to the whole person regarding claimant's lumbar spine. However, Dr. Bieri apportioned 3 percent

[9] Bieri Depo., Ex. 1 at 7.

as preexisting and 2 percent as the result of claimant's 2009 injury. Dr. Bieri indicated claimant's total combined impairment equals 15 percent to the whole person.

Dr. Bieri did not provide an opinion on claimant's employability, but he did review the task lists generated by Mr. Hardin and Mr. Benjamin. Of the 20 unduplicated tasks on Mr. Benjamin's list, Dr. Bieri opined claimant could no longer perform 6, for a 30 percent task loss. Of the 19 unduplicated tasks on Mr. Hardin's list, Dr. Bieri concluded claimant could no longer perform 7, for a 36.8 percent task loss.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-510c(a)(2) states, in part:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. . . . In all other cases permanent total disability shall be determined in accordance with the facts.

An injured worker is permanently and totally disabled when he is "essentially and realistically unemployable."[10]

The "existence, extent and duration of an injured workman's incapacity is a question of fact for the trial court to determine."[11] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability.

The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[12]

K.S.A. 2008 Supp. 44-501(h) states:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount

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[10] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[11] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 803, 522 P.2d 395 (1974).

[12] See *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

> of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

ANALYSIS

1. What is the nature and extent of claimant's disability?

a. What is claimant's functional impairment?

Three physicians provided impairment for claimant's shoulders. Dr. Stein assessed an eight percent impairment to her right shoulder and a one percent impairment to the left. Dr. Do assessed a seven percent impairment to the right shoulder and a two percent impairment to the left. Dr. Bieri assessed a 14 percent impairment to her right shoulder and a 9 percent impairment to the left. Dr. Murati assessed a 15 percent impairment to the right shoulder and a 15 percent impairment to the left.

The Board finds that an average of all of the impairment ratings to the upper extremities reasonably reflects claimant's impairment. Claimant suffers an 11 percent impairment to her right upper extremity and a 4 percent impairment to her left upper extremity.

In addition to the upper extremity impairments, Dr. Do assigned a 5 percent whole body impairment for claimant's low back complaints. Dr. Bieri assigned a two percent whole body impairment for claimant's low back complaints. Dr. Stein did not believe the medical history supported a finding of impairment for any body part other than the shoulders, or a 0 percent impairment of the lumbar spine. Dr. Murati opined claimant suffered a 10 percent impairment of the lumbar spine.

Dr. Murati assessed a five percent impairment for the cervicothoracic spine and five percent impairment for the thoracolumbar spine. Dr. Murati's assignment of impairment for the cervicothoracic and thoracolumbar spine is inconsistent with the weight of the medical evidence. No other physician assessed an impairment for claimant's cervical or thoracic spine related to this accident. With regard to the lumbar spine, the Board finds it reasonable in this case to average the impairment ratings of all four physicians and finds claimant suffers a four percent impairment to the lumbar spine.

Utilizing the AMA *Guides'* conversion table,[13] claimant's upper extremity impairments convert to seven percent of the whole person on the right and two percent of the whole person on the left. Claimant has a total whole person impairment of 14 percent resulting from her injuries. The evidence of bilateral upper extremity impairment triggers the presumption of permanent total disability.

b. Is claimant permanently and totally disabled?

The Court of Appeals, in *Wardlow v. ANR Freight Systems*, adopted a trial court finding that permanent and total disability was:

> [B]ased on a totality of the circumstances including [Wardlow's] serious and permanent injuries, the findings of Drs. Prostic and Redford, the extremely limited physical chores [Wardlow] can perform, his age, his lack of training, driving and transportation problems, past history of physical labor jobs, being in constant pain, and constantly having to change body positions.[14]

The Court of Appeals in *Wardlow* also found the trial court's finding that the claimant was permanently and totally disabled because he was essentially and realistically unemployable to be compatible with legislative intent.[15]

In *Lyons v. IBP, Inc*., the Court of Appeals wrote:

> The Board correctly noted that *"Wardlow* still provides precedential guidance regarding what factors should be considered in the factual determination of what constitutes permanent and total disability." Its ruling that "essentially and realistically unemployable" is compatible with legislative intent, comports with the totality of circumstances approach to factually determining permanent total disability.[16]

In *Loyd v. ACME Foundry, Inc*., the Court of Appeals wrote:

> In Kansas, the existence, extent, and duration of an injured worker's disability is a question of fact to be determined from the totality of the circumstances. In *Wardlow*, the claimant was found to be permanently and totally disabled based on his serious and permanent injuries, his limitations on physical activity, his age, his lack of training, his driving and transportation problems, his history of physical labor jobs, his constant pain, and his constant switching of body positions. Although the court

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[13] AMA *Guides*, Table 3, p. 20.

[14] *Wardlow v. ANR Freight Systems,* 19 Kan. App. 2d 110, 114, 872 P.2d 299 (1993).

[15] *Wardlow, supra,* at 113.

[16] *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 378, 102 P.3d 1169 (2004).

> in *Wardlow* did not examine the claimant's intelligence or education, it did factor in analogous characteristics such as his history of employment in manual labor jobs and lack of training. In Loyd's case, therefore, her lack of education and low intelligence can be considered as part of the totality of the circumstances in determining whether she is now permanently and totally disabled. [Citations omitted.][17]

More recently, in *Blankley v. Russell Stover Candies, Inc.*, the Court of Appeals wrote:

> Whether a worker is capable of engaging in substantial and gainful employment is a factual determination, made by examining the totality of the evidence, which includes, but is not limited to, the claimant's physical activity, age, intelligence, education, lack of training, job history, and constant pain. See *Lyons v. IBP, Inc*., 33 Kan.App.2d 369, 370-78, 102 P.3d 1169 (2004)(affirming Board finding of permanent total disability on "totality of the circumstances approach" even though no medical doctor rated claimant 100% disabled); *Wardlow v. ANR Freight Systems*, 19 Kan.App.2d 110, 113–15, 872 P.2d 299 (1993).[18]

In determining if claimant is permanently and totally disabled as a result of her injuries, the Board will consider the totality of the circumstances, which includes, but is not limited to, the claimant's physical activity, age, intelligence, education, lack of training, job history, and constant pain.

In its effort to rebut the presumption of permanent total disability, respondent relies on the medical testimony of Drs. Stein and Do. Respondent notes Dr. Stein felt claimant was employable. However, Dr. Stein placed significant restrictions on claimant's ability to perform work activities at or above shoulder level.

Respondent also partially relies on Dr. Do's opinion that claimant is capable of substantial and gainful employment. Respondent argues Dr. Do did not give claimant permanent restrictions. Dr. Do testified he did not give claimant restrictions because claimant told him she could self-limit her activities. That does not mean claimant can work without any restrictions. The medical evidence, in itself, is insufficient to rebut the presumption of permanent total disability.

In its effort to show claimant is capable of finding substantial employment, respondent produced the testimony of Mr. Benjamin. In his report, Mr. Benjamin opined claimant was capable of earning $325.92 per week. However, Mr. Benjamin agreed on

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[17] *Loyd v. ACME Foundry, Inc*., No. 100,695 (Kansas Court of Appeals unpublished opinion filed Oct. 16, 2009).

[18] *Blankley v. Russell Stover Candies, Inc*., No. 110,014 (Kansas Court of Appeals unpublished opinion filed May 30, 2014).

cross-examination that he had no idea whether job placement would be successful for claimant. He did not perform a labor market survey and agreed he could not opine whether there were any jobs realistically available that claimant could perform. Mr. Benjamin agreed his opinions were predicated on the belief claimant was "able to perform any and all tasks of any type for eight hours a day."[19]

Mr. Benjamin listed five jobs he believed claimant could perform. Four of the jobs required the use of a cash register or computer. Mr. Benjamin performed no aptitude testing to support the premise that claimant was capable of being trained in the listed employments. Mr. Benjamin did not know if claimant had the aptitude to perform the listed jobs.

Mr. Benjamin did not consider any of claimant's low back complaints or restrictions. Claimant reported to Dr. Bieri that she has pain associated with bending, twisting and lifting. Claimant told Dr. Do she was experiencing low back pain and left lower extremity numbness. Dr. Do assessed an impairment rating for claimant's low back pain. Dr. Stein also noted numbness in the left lower extremity. Dr. Murati diagnosed lumbar radiculopathy and assigned a no bend, crouch or stoop restriction. Claimant's low back impairment and complaints are factors in claimant's ability to find employment that were disregarded by Mr. Benjamin.

Considering claimant's age, education, lack of training, job history, physical restrictions, and complaints of pain, the Board finds respondent failed to rebut the presumption of permanent total disability.

2. Is respondent entitled to an offset based on claimant's Social Security retirement benefits, and if so, are the disability benefits for functional impairment and temporary total disability benefits subject to the Social Security offset?

Claimant cites *Hoesli v. Triplett, Inc.*[20] in support of the argument that respondent is not entitled to a credit for Social Security retirement benefits. In *Hoesli*, the Kansas Court of Appeals found K.S.A. 44-501(h) to be invalid based upon the Senior Citizens Freedom to Work Act, which provides that there can be no reduction in Social Security retirement benefits due to wages regardless of the amount of wages earned by individuals age 65 and older.[21]

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[19] Benjamin Depo. at 21.

[20] *Hoesli v. Triplett, Inc*., 49 Kan. App. 2d 1011, 1012, 321 P.3d 18 (2014), *pet. for rev. filed* Apr. 3, 2014.

[21] Senior Citizens' Freedom to Work Act of 2000, § 4(b), 42 U.S.C.A. § 402.

Supreme Court Rule 8.03(i) states:

> The timely filing of a petition for review stays the issuance of the mandate of the Court of Appeals. Pending the determination of the Supreme Court on the petition for review and during the time in which a petition for review may be filed, the opinion of the Court of Appeals is not binding on the parties or on the district courts. An interested person that wishes to cite a Court of Appeals opinion for persuasive authority before the mandate has issued must note in the citation that the case is not final and may be subject to review or rehearing. If petition for review is granted, the decision or opinion of the Court of Appeals has no force or effect, and the mandate will not issue until disposition of the appeal on review. If a petition for review is granted in part, a combined mandate will issue when the appellate review is concluded, unless otherwise specifically directed by the Supreme Court. If review is refused, the decision of the Court of Appeals is final as of the date of the refusal, and the clerk of the appellate courts must issue the mandate of the Court of Appeals.

Regardless of the decision in *Hoesli*, which is not final, the Board is required to follow precedent in this matter and apply the Social Security offset to claimant's award.

K.S.A. 44-501(h) states any workers compensation benefit payments to which claimant is entitled shall be reduced by the weekly equivalent amount of the total amount she is receiving in Social Security retirement benefits. While the Kansas Supreme Court has created an exception to the statute that applies to retired workers who are already receiving Social Security retirement benefits and then reenter the workforce to supplement that Social Security income,[22] the exception does not apply in this case.

Respondent is entitled to an offset for the full amount of Social Security retirement benefits received by claimant. The parties stipulated to the applicable Social Security benefit rate as follows:

January 1, 2010 - December 31, 2011:	$930.00 per month
January 1, 2011 - December 31, 2012:	$939.50 per month
January 1, 2012, and forward:	$972.90 per month

K.S.A. 2008 Supp. 44-501(h) states, in relevant part, "in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment." The Kansas Supreme Court, in *Dickens*, stated, "K.S.A.1998 Supp. 44-501(h) does not allow an offset of the functional impairment

[22] See *Dickens v. Pizza Co. Inc.*, 266 Kan. 1066, 974 P.2d 601 (1999).

award."[23] As such, the offset does not apply to those weeks of permanent partial disability attributable to claimant's functional impairment.

Respondent argues, in its brief, the retirement offset applies to all benefits, including TTD. In our decision in *Hoesli,*[24] the Board denied the respondent's request to offset TTD, saying:

> . . . the Board would rule against respondent's request. K.S.A. 2009 Supp. 44-501(h), above cited, limits the offset to no less than the benefit payable for the employee's percentage of functional impairment. Functional impairment is calculated pursuant to the instructions contained in K.S.A. 2009 Supp. 44-510e(a)(1)(2)(3). Functional impairment cannot be calculated without first taking into consideration the TTD awarded. If respondent is granted an offset against the TTD awarded, the amount of functional impairment will be impacted, ultimately violating K.S.A. 2009 Supp. 44-501(h). The Award will not be modified to offset claimant's TTD by his weekly social security benefit.[25]

The offset for retirement benefits does not apply to TTD.

3. Is respondent entitled to an offset based on claimant's KPERS benefits, and if so, what is the amount?

Under K.S.A. 2008 Supp. 44-501(h), claimant's compensation benefit payments under the Kansas Workers Compensation Act shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit attributable to payments or contributions made by the claimant. The Board has held the reduction of the KPERS offset can be based on the percentage of an employee's contributions to KPERS made prior to their retirement.[26] Claimant contributed $15,228.09 (52%) to KPERS, while respondent contributed $14,292.34 (48%), a total of $26,003.10.

The evidence shows claimant is receiving retirement benefits under a retirement system, program or plan, which is provided by the respondent against which the claim is being made. Claimant's portion of retirement benefits attributable to her payments or contributions, including interest, is 52 percent. Respondent contributed the remaining 48 percent. Out of the $147.34 weekly KPERS benefit, respondent is entitled to a credit

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[23] *Dickens, supra,* at 1070.

[24] *Hoesli v. Triplett, Inc.*, No. 1,056,540, 2013 WL 485706 (Kan. WCAB Jan. 29, 2013).

[25] *Id*. at 8.

[26] See *Aguirre v. U.S.D. 501,* No. 264,161, 2003 WL 22401257 (Kan. WCAB Sep. 30, 2003).

against permanent disability benefits (exclusive of TTD and PPD for functional impairment) in the amount of $70.72.

CONCLUSION

Claimant is permanently and totally disabled from engaging in substantial and gainful employment as the result of injuries arising out of and in the course of her employment with respondent. Respondent is entitled to a credit equal to the weekly equivalent of the amount claimant receives in Social Security retirement benefits, excluding periods of functional impairment and TTD. Respondent is entitled to a credit for claimant's KPERS benefits in the amount of $70.72.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated June 12, 2014, is affirmed in part and modified in part.

Claimant is entitled to temporary total disability compensation from May 26, 2009, through October 26, 2010, a period of 74 weeks, at the full compensation rate of $529.00 per week, which equals $39,146.00

Beginning October 27, 2010, through October 11, 2011, claimant is entitled to 49.86 weeks compensation for a 14 percent functional disability, at the rate of $529.00 per week, for a total of $26,375.94.

Claimant is entitled to permanent total disability compensation, subject to a credit for Social Security in the amount of $216.81, from October 12, 2011, through December 31, 2011, a period of 11.71 weeks, at the rate of $312.19 per week, which equals $3,655.75.

Claimant is entitled to permanent total disability compensation, subject to a credit for Social Security in the amount of $224.54, from January 1, 2012, through May 5, 2012, a period of 18 weeks, at the rate of $304.46 per week, which equals $5,480.28.

Claimant is to entitled permanent total disability compensation, subject to a credit for Social Security in the amount of $224.54 and KPERS in the amount of $70.72, from May 6, 2012, through November 17, 2014, a period of 132.29 weeks, at the rate of $233.74 per week, which equals $30,921.47.

Through November 17, 2014, respondent owes $105,579.43. Thereafter, claimant is entitled to compensation benefits at the rate of $221.95 per week, subject to proof of changes in claimant's Social Security and KPERS benefit rates, until claimant receives an additional $19,420.57 in weekly benefits, for a total award of $125,000.

IT IS SO ORDERED.

Dated this _____ day of November, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Members dissent from the finding of the Board that claimant's workers compensation payments should be reduced by the weekly equivalent amount of the total amount of claimant's KPERS retirement benefit, less any portion of said retirement benefit attributable to payments or contributions made by claimant.

The SALJ determined a portion of claimant's workers compensation benefits should be reduced by a portion of her KPERS retirement benefits. He stated:

> It is determined from the record, Exhibit 3, Preliminary Hearing of May 20, 2010, that Claimant contributed $11,627.69 to KPERS while her employer contributed $14,627.19, a total of $26,254.88. There is an additional $2,208.90 earned as KPERS interest.
>
> Respondent is entitled to an offset if the employer's contribution can be determined as well as an assigned percentage. In this case, it appears the employer contributed 55.71% while the Claimant contributed 44.28%. Rounding the percentages would equate to 56% contributed by the employer and 44% contributed by the Claimant and in regard to interest earned that would equate to $971.92 as Claimant's interest contribution and $1,236.98 as employer interest contribution.

> Applying the same percentage to the interest earned, because the interest received was not solely attributable to Claimant's contributions, the Claimant made an additional contribution of $971.92 and the employer an additional $1,236.98 due to interest apportionment. Total contributions to KPERS would equate to $12,599.61 for the Claimant and $15,864.17 for the Respondent.
>
> Based on Claimant's longevity and amortization of a remaining 19.8 years of life expectancy (1,029.6 weeks), her annual contribution to KPERS would be $636.34 a year, equaling $12.23 per week. The employer contribution would be $801.22 annual contribution to KPERS equaling $15.40 per week, the amount to be credited to the employer in this matter.
>
> Accordingly, Claimant's weekly benefit rate under KPERS should be reduced on a weekly basis of $15.40 and reduced for Social Security benefits up to the age of 65 based on stipulations of the parties per agreement on May 9, 2012.[27]

The Board agreed with the SALJ claimant's workers compensation benefits should be reduced by claimants KPERS benefits, less her contributions, but calculated the reduction differently than did the SALJ. The undersigned Board Members disagree with the Board's assessment that respondent met its burden of proving the total amount of claimant's KPERS retirement benefit and that portion of claimant's total KPERS retirement plan contributed by respondent.

Mary Beth Green is the member services officer for KPERS. She is responsible for managing the division that calculates benefit payments to members. In order to perform these duties, Ms. Green has an understanding of how KPERS pays benefits and under what circumstances. She is also knowledgeable of how much employee contributions might be required and how much employer-type contributions are required. She also knows the types of benefits available to KPERS members.

Ms. Green testified claimant contributed 4% of her monthly income to KPERS. Claimant's contributions funds three KPERS benefits: claimant's retirement, disability benefits and a death benefit. Of the 4% contributed by claimant to KPERS, $11,710.76 and interest earned of $3,517.33, or a total of $15,228.09, were credited to her retirement fund. Ms. Green indicated the primary benefit of KPERS is the retirement benefit. She testified:

> During their working careers members make contributions, employers make contributions, they accumulate service credit for the number of years they work and when they retire they receive a benefit that is calculated using their final salary figures and years of service.[28]

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[27] SALJ Award (June 12, 2014) at 9-10.

[28] Green Depo. at 9.

If claimant quit or died while working, but before her retirement benefits vested, her 4% contribution and interest would be paid to her beneficiaries. If claimant died during her employment, her beneficiaries would also receive a death benefit payment. The amount of the death benefit payment would depend on whether claimant's death was job-related or not. If claimant became disabled while working for respondent, she would be entitled to receive disability benefits.

Ms. Green explained that until an employee retires, his or her retirement contributions and interest earned are kept in a separate account. However, when an employee retires, his or her contributions and interest are transferred to the KPERS fund, and retirement payments are made to the retired worker from that fund. If a retired worker dies, his or her beneficiaries receive a payment in the amount of any accumulated retirement contributions they made to KPERS, less retirement benefits they were paid. The beneficiaries of the deceased retiree also receive a $4,000 death benefit. Ms. Green testified that funds from other retired employees, from respondent and other employers are paid into the KPERS fund. She agreed the retired employees of other school districts and retired employees of other state agencies are paid into the KPERS fund. The KPERS fund also earns income.

Ms. Green testified that when an employee retires he or she has options on how to receive their KPERS benefits. Claimant chose to begin receiving benefits based on a calculation based on her highest three years of earnings and began receiving $638.47 monthly retirement payments from KPERS in April 2010. Ms. Green confirmed that amount will remain the same unless the Kansas Legislature changes the KPERS program or statutorily increases KPERS retirement benefits. A retiree can take a portion of the account based on the "value of the account." He or she can take up to 50% in a lump sum, and there are calculations and tables that compute that amount. This is an actuarial value of their account, which is based on the formula of years of service times the salary figure of the highest three years times the statutory multiplier. Ms. Green testified this distribution amount is not dependent on one's contributions.

When asked what percentage of claimant's retirement benefits are attributable to her contributions, Ms. Green testified as follows:

> Q. (By Mr. Carmichael) My question, I think was, is it possible at this point to determine what percentage of Ms. Vanorman's [sic] pension benefits from KPERS are attributable to her contributions versus contributions made by USD 259 on her account - - on account of her employment, years of employment, versus contributions made by 259 for other employees or even other employers participating in the plan, is it possible to do that?
>
> A. I don't know.
>
> Q. All right. Is it possible for you to do that?

A. No.

Q. All right. Why would you not be able - - and I'm not trying to - - I just want the Judge to understand the situation because I think I know but I have to ask. Why is it not possible for you to make that type of a calculation?

A. I am not a trained actuary so I am unsure whether it would be possible for an actuary to make that type of calculation, but I do not have that background.[29]

Ms. Green also testified:

Q. Similarly under this type of a plan the amount that an employee receives in terms of their monthly KPERS benefit is not dependent upon the amount of their personal contributions over the years toward their membership?

A. Correct.[30]

Ms. Green testified the biggest factors in determining claimant's KPERS monthly retirement benefit are her highest three years of salary and how long she worked. Ms. Green also testified KPERS is a defined benefit plan. She explained employers and workers contribute to the plan, but benefits are based upon a statutory formula, as opposed to the amount claimant contributed during her years of employment.

Ms. Green's testimony convinces the undersigned Board members insufficient evidence was presented to prove claimant's total KPERS benefit, or what portion of claimant's KPERS benefit is attributable to respondent and what percentage is attributable to claimant. As pointed out by Ms. Green, claimant's monthly KPERS retirement payment is set by a statutory formula and is not dependent upon her contributions to KPERS.

For example, an employee who retires after working twenty years and made $20,000 annually the first fifteen years of their career and $75,000 a year the last five years of their career will receive a larger monthly retirement plan than an employee who made $50,000 annually for twenty years. Over the course of their careers, the first employee will have paid in fewer contributions to KPERS than the second employee, yet receives a larger monthly retirement benefit.

The undersigned Board Members disagree with this analysis. K.S.A. 2008 Supp. 44-501(h) is not clear and unambiguous. It provides that claimant's workers compensation

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[29] *Id.* at 22.

[30] *Id.* at 25.

benefits shall be reduced by the weekly equivalent of the total amount of an injured worker's retirement benefit, less any portion attributed to contributions by the employee.

The language of K.S.A. 2008 Supp. 44-501(h) makes it extremely difficult to determine the total amount of claimant's retirement benefit attributable to her contributions. Ms. Green, a member services officer for KPERS, testified she could not ascertain the portion of claimant's retirement benefit attributable to her. She indicated an actuary may be able to do so, but was uncertain.

The dissent believes case law supports its position. The Board previously addressed this issue in *Bohanan*.[31] USD 260 requested a reduction in claimant's workers compensation benefits equal to her KPERS retirement benefits. The Board denied the request of USD 260, stating:

> Respondent contends under K.S.A 44-501(h) entitlement to an offset equal to claimant's KPERS and early retirement benefits. As K.S.A. 44-501(h) requires any offset be based upon the amount of benefits provided by the employer and as there is no information in the record to indicate what percentage of claimant's KPERS benefits were provided by the employer, no offset can be allowed for this benefit.

The Kansas Court of Appeals affirmed, stating:

> The Board's decision to not allow an offset for Bohanan's KPERS benefits is equally correct. In its order, the Board stated the district would be entitled to an offset if it could produce evidence of what percentage of Bohanan's KPERS benefits were provided by the district. The Board's holding should not be disturbed since there is no evidence in the record to indicate that amount.[32]

Bohanan requires that in order to be entitled to a reduction, the employer must produce evidence as to what portion it contributed to the injured worker's total retirement benefit. That supports the undersigned's legal analysis that it is respondent's burden of proof to show the portion it contributed to claimant's total retirement benefit.

Respondent has failed to meet its burden. Respondent can and has proven the amount of money it contributed to claimant's KPERS retirement fund and the amount claimant contributed. However, that does not satisfy the requirements of K.S.A. 2008 Supp. 44-501(h), which requires respondent to prove the weekly equivalent of the total amount of claimant's retirement benefit, less any portion attributed to her contributions. Respondent has proven the apportionment of contributions paid in to claimant's KPERS retirement fund. From Ms. Green's testimony it is clear that respondent has failed to prove the

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[31] *Bohanan v.* U.S.D. No. 260, No. 190,281, 1995 WL 715312 (Kan. WCAB Nov. 14, 1995).

[32] *Bohanan v.* U.S.D. No. 260, 24 Kan. App.2d, 947 P.2d 440 (1997).

apportionment of contributions claimant or respondent made to claimant's monthly retirement payments. Claimant's monthly retirement payments are determined by a statutory formula established by the Kansas Legislature, not the contributions made by claimant and respondent.

Moreover, there is insufficient evidence establishing the total value of claimant's KPERS retirement benefit. In order to overcome this deficiency, the SALJ calculated claimant's life expectancy at 19.8 years, presumably using the mortality tables in Pattern Instructions of Kansas, Civil, 4th Sec. 171.45 (2010) (PIK)[33] to estimate how long claimant will live and to value claimant's retirement benefit. However, there is nothing in the record to establish claimant's life expectancy.

The majority, in an attempt to remedy this defect, calculated the reduction by multiplying claimant's monthly retirement benefit payment by 48%. That figure was obtained by comparing the contributions made by respondent and claimant to claimant's retirement fund. The majority has never determined the total value of claimant's retirement benefit. Instead, the majority has used claimant's monthly retirement benefit payment as a basis for reducing claimant's workers compensation basis.

In summary, the undersigned believe the burden of proof is upon respondent to show its percentage of contribution to claimant's total KPERS retirement benefit. The total value of claimant's KPERS retirement benefit has never been established. There is insufficient evidence in the record to ascertain the amount of the reduction to which respondent is entitled for its contributions to claimant's total KPERS retirement benefit.

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BOARD MEMBER

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BOARD MEMBER

[33] Respondent's brief to ALJ Barnes at page 11 references Pattern Instructions of Kansas, Civil, 4th Sec. 171.45 (2010).

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